No. 88-1905

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

EDDIE KELLER, *et al.*,
*Petitioners*,

v.

STATE BAR OF CALIFORNIA, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the California Supreme Court**

## MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF FOR THE *AD HOC* COMMITTEE OPPOSING LOBBYING AND CERTAIN OTHER ACTIVITIES OF A MANDATORY BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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November 1989

In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1989

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EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M. KINTER; DAVID LAMPE; GARRETT BEAUMONT; CHRISTOPHER L. FAIRCHILD; JOHN A. GRODNIER; CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.; J. ROBERT JIBSON; CHARLES P. JUST; DAROLD D. PIEPER; THOMAS HUNTER RUSSELL; NANCY L. SWEET; MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON; THOMAS R. YANGER; WARD A. CAMPBELL; DONALD C. MEANY; ASSEMBLYMAN PATRICK J. NOLAN; and A. WELLS PETERSEN,

*Petitioners,*

v.

STATE BAR OF CALIFORNIA, a public corporation; ANTHONY M. MURRAY; PATRICIA GREENE; GIRT K. HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY VAN LOUKS; THOMAS W. ERES; JOHN H. COSTANZO; GEORGE W. COUCH, III; BURKE M. CRITCHFIELD; THOMAS R. DAVIS; DIXON Q. DERN; RUTH CHURCH GUPTA; DALE E. HANST; LEONARD HERR; ROBERT A. HINE; MARTA MACIAS; PHILLIP SCHAFER; CRAIG A. SILBERMAN; DANIEL J. TOBIN; JAMES D. WARD; and JOON HEE RHO,

*Respondents.*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT**

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**MOTION OF THE *AD HOC* COMMITTEE OPPOSING LOBBYING AND CERTAIN OTHER ACTIVITIES OF A MANDATORY BAR FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

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## MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

The *Ad Hoc* Committee Opposing Lobbying and Certain Other Activities of a Mandatory Bar [hereinafter Committee] hereby moves this Court for leave to file the accompanying brief *amicus curiae* in support of the petitioners. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondents was requested but refused.

## INTEREST OF *AMICUS CURIAE* AND REASONS FOR GRANTING THE MOTION

The Committee is a group of attorneys who are members of a mandatory bar. It is composed of attorneys engaged in public service and private practice, formed for the sole purpose of filing the accompanying brief with this Court. Appendix A is a list of the Committee membership.

The Committee believes it can give the Court a different context within which to evaluate the issues raised in the petition for a writ of certiorari. Also, although members of the District of Columbia Bar have achieved a measure of protection through referendum, a favorable decision by this Court would insure and further protect their First Amendment rights.

The Committee has no reason to believe that the facts or questions of law will not be presented adequately by petitioners. However, the Committee believes petitioners will focus their presentation on the issues as they pertain to the State Bar of California. The Committee believes that its brief can add a broader dimension to the facts and questions of law before the Court.

## CONCLUSION

For the foregoing reasons, this motion for leave to file the accompanying brief *amicus curiae* should be granted.

Respectfully submitted,

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## APPENDIX A

The affiliations of the members of the Committee are for purposes of identification only and do not necessarily reflect the views of the affiliated entities.

*John P. Arness*, District of Columbia Bar, The Bar Association of the District of Columbia (President 1977-1978). Mr. Arness is a partner in a large Washington, D.C. law firm.

*James J. Bierbower*, District of Columbia Bar (President 1981-1982), The Bar Association of the District of Columbia (President 1978-1979). Mr. Bierbower has held numerous positions within the Bar and has been active in monitoring its activities. Mr. Bierbower is a partner in the Washington, D.C. law firm of Bierbower & Bierbower.

*Anne M. Brennan*, District of Columbia Bar. Ms. Brennan is an Assistant Counsel with the Naval Sea Systems Command.

*Thomas G. Corcoran, Jr.*, District of Columbia Bar. Mr. Corcoran, a former Assistant United States Attorney, was active in the proceedings following the 1980 referendum limiting the use of mandatory dues by the Bar. He is a partner in the District of Columbia law firm of Corcoran, Youngman & Rowe.

*J Leib Dodell*, District of Columbia Bar. Mr. Dodell was recently admitted to the District of Columbia Bar in October 1989. Mr. Dodell, who is familiar with the issues of concern to the *Ad Hoc* Committee as a result of his father's long-term endeavors in this area, is an associate with the Washington, D.C. law firm of Williams & Connolly.

*Nathan Dodell*, District of Columbia Bar. Mr. Dodell has been very active in monitoring Bar activities and has successfully initiated several bar referenda, and has served on Bar Committees. Mr. Dodell is an Assistant United States Attorney.

*John Jude O'Donnell,* District of Columbia Bar (Board of Governors 1981-1984), The Bar Association of the District of Columbia (President 1980-1981, Board of Governors 1976-1982). Mr. O'Donnell has been active in monitoring the activities of the Bar. Mr. O'Donnell is a partner in the Washington, D.C. law firm of Thompson, Larson, McGrail, O'Donnell & Harding.

*A. Patricia Frohman,* District of Columbia Bar (Treasurer 1973-1975), Women's Bar Association of the District of Columbia (President 1963-1964), Bar Association of the District of Columbia (Secretary 1968-1969). Ms. Frohman was Vice Chair (1976-1978) of the Mayor's D.C. Commission on Status of Women. Ms. Frohman is an Assistant United States Attorney.

*Stephen W. Grafman,* District of Columbia Bar. Mr. Grafman, a former Assistant United States Attorney, is a partner in the Washington, D.C. office of a multi-city law firm and is active on a personal basis on behalf of several voluntary legal-related organizations for whom he provides *pro bono* assistance.

*Joseph H. Hairston,* District of Columbia Bar, Washington Bar Association (Treasurer), National Bar Association (Treasurer). Mr. Hairston has served on committees of the District of Columbia Bar and has been very active in monitoring its activities. He is a retired attorney of the United States Department of the Treasury.

*Michael S. Levy,* District of Columbia Bar. Mr. Levy was an Assistant Corporation Counsel in the District of Columbia for ten years handling major litigation involving real estate. For the last ten years he has been engaged in private practice, handling real estate and District of Columbia matters. Mr. Levy is a partner in the District of Columbia law firm of Landis, Cohen, Rauh and Zelenko and a member of the Alcoholic Beverage Control Board of the District of Columbia.

*Lee Loevinger,* District of Columbia Bar, Bar Association of the District of Columbia, Minnesota Bar, Bar Association of Minnesota. Mr. Loevinger has chaired a section of the American Bar Association and held other positions within that organization. Mr. Loevinger has been an Associate Justice of the Minnesota Supreme Court, Assistant Attorney General in the United States Department of Justice, and a Commissioner of the Federal Communications Commission. Since 1968, Mr. Loevinger has been engaged in the private practice of law. Mr. Loevinger has been active in a variety of bar associations and has maintained an interest in the proper role of bar associations and other professional associations.



*John T. Miller, Jr.,* District of Columbia Bar, Connecticut Bar, United States Supreme Court Bar, Federal Energy Bar Association (President, 1989-1990), American Bar Association (Chairman, Administrative Law Section 1972-1973). Mr. Miller has also served as a Faculty Member of the National Judicial College (1974-1983) and Adjunct Professor of Law at the Georgetown University Law School.

*Bernard I. Nordlinger,* District of Columbia Bar, Bar Association of the District of Columbia (President, 1972-1973). Mr. Nordlinger was Chairman (1979) and a member of the Committee on Admissions and Grievances of the United States District Court for the District of Columbia. Mr. Nordlinger is a Mediator for the United States Court of Appeals for the District of Columbia Circuit and an Evaluator, Early Neutral Evaluation Program, United States District Court for the District of Columbia. He was a founder in 1932, of King & Nordlinger, the Washington, D.C. law firm in which he is a partner.

*Kenneth Wells Parkinson,* District of Columbia Bar. Mr. Parkinson is engaged in the private practice of law in the District of Columbia.

*Larry J. Rector,* District of Columbia Bar. Mr. Rector has published an article which discusses use of dues by a mandatory bar[1] and he has been active in monitoring the activities of the Nebraska State Bar Association. Mr. Rector is an associate with the Washington, D.C. law firm of Arnold & Porter.

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*1 See* Special Project, *Compelled Financial Support of a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis,* 66 Neb. L. Rev. 762 (1987).

*James P. Riley*, District of Columbia Bar. Mr. Riley is a member of several voluntary bar associations. He has monitored activities of the Bar, and took an active role in the proceedings following the 1980 referendum limiting the use of mandatory dues by the Bar. Mr. Riley is a partner in the Washington, D.C. law firm of Fletcher, Heald & Hildreth.

*Arthur B. Spitzer*, District of Columbia Bar (Member, Steering Committee Section 4 (Courts, Lawyers and the Administration of Justice)). Mr. Spitzer is the Legal Director of the American Civil Liberties Union of the National Capital Area.

*Jacob A. Stein*, District of Columbia Bar (President, 1982-1983), Bar Association of the District of Columbia (President, 1982-1983), Maryland Bar. Mr. Stein is an Adjunct Professor of Law at George Washington University (1984- ) and Georgetown University Law School (1985- ). He is the author of several books and articles on various legal subjects. Mr. Stein is a trial lawyer in the District of Columbia.

*Stephen A. Trimble*, District of Columbia Bar (Board of Governors, 1978-1981), Bar Association of the District of Columbia (President, 1976-1977). As a Governor, Mr. Trimble cautioned against the Board of Governors taking political positions that might be opposed by members holding different views. He is a partner in the District of Columbia law firm of Hamilton and Hamilton.

*Bruce J. Terris*, District of Columbia Bar. Mr. Terris, a former Assistant to the Solicitor General (1958-1965), is in the private practice of law specializing in environmental and employee rights cases. He was actively involved in a campaign involving one referendum of the Bar.

**In The**

# SUPREME COURT OF THE UNITED STATES

**October Term, 1989**

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### INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief is filed contingent on the granting of the foregoing motion for leave of Court to file said brief. The interest of *amicus curiae* is set forth in that motion.

### SUMMARY OF ARGUMENT

When a mandatory bar engages in legislative and lobbying activities the First Amendment is violated. This conclusion is inescapable. There are no compelling state interests that are furthered by such activities that cannot also be furthered through means less restrictive to the rights of dissenting bar members. Mandatory bar membership is, in itself, an infringement on the rights of bar association members. This restriction, however, has been found to be justified by compelling state interests. Additional restrictions on the rights of bar members should not be countenanced by this Court especially when, as in the case of legislative and lobbying activities, the activity fails to further any compelling state interests.

Moreover, when a lawyer is compelled to finance such activity the First Amendment rights of the lawyer are also violated. The remedy for these constitutional deprivations is an injunction prohibiting a mandatory bar from undertaking activities which fail to further compelling state interests.

## ARGUMENT

### I. LEGISLATIVE AND LOBBYING ACTIVITIES BY A MANDATORY BAR VIOLATE THE FIRST AMENDMENT

The First and Fourteenth Amendments to the United States Constitution guarantee that no state shall abridge the freedoms of speech and association. "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."[1] As this two century-old quote from perhaps the foremost authority on the Constitution and First Amendment illustrates, this issue addresses the very concerns that prompted the drafting of the Constitution. The First Amendment was drafted to protect the people from tyranny of government. This Court should return to these fundamental principles in resolving this issue.

Over the past seventy-five years the compulsion inherent in the mandatory bar has been a major concern to the profession and continues to be the subject of heated debate. A mandatory bar is an association that all attorneys must join as a condition to the granting of a license to practice law. Many states and the District of Columbia have mandatory bars. One characteristic common to most is the requirement that members pay annual dues to the association to support its activities. Mandatory bars are involved in many activities that range both in scope and purpose. For example, mandatory bars oversee many aspects of the profession including admission, discipline and prevention of the unauthorized practice of law. The bar provides educational programs for its members and the public. In addition, many bars lobby their state legislatures on issues that may impact upon the bar, the lawyer, and the profession.[2] For example, several mandatory bars have been involved in tort

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*1* Thomas Jefferson (1779) (quoted in I. Brant, *James Madison: The Nationalist* 354 (1948)).

2 While many bar members object to more than simply the legislative and lobbying activities of a mandatory bar, it is recognized that this is not the case to challenge those additional activities. The issues presented and the record before the Court involve only the legislative and lobbying activities of the State Bar of California.



reform and other issues that affect the economic interests of their members.

The State Bar of California is authorized under state law to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice...." Cal. Bus. & Prof. Code § 6031(a) (West Supp. 1989). This broad authority has been incorporated in most statutes and court rules integrating the nation's mandatory bars.[3] The authorizations in many states were patterned after various Model Bar Organization Acts containing "administration of justice and advancement of jurisprudence" language.[4] Thus, the decision of this Court will have a direct and immediate impact on almost every mandatory bar in this country.

#### A. Mandatory Bar Activities Must Further Compelling State Interests and Must Be Scrupulously Tailored To Promote Those Interests Through The Least Restrictive Means

Any analysis of this issue must start with the premise that the First Amendment protects one against compelled association. This was noted by Justice Douglas in *NLRB* v. *Textile Workers Local 1029*, 409 U.S. 213, 216 (1972), wherein he referred to "the law which normally is reflected in our free institutions — the right of the individual to join or to resign from associations, as he sees fit...."

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*3 See* Special Project, *Compelled Financial Support of a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis*, 66 Neb. L. Rev. 762, 791-92 n.124 (1987) ("One may think that looking to the legislation or court rule establishing the integrated bar would be an appropriate place to begin this analysis, but most integrated bar rules and statutes are worded in very broad and general terms. The typical language is 'the advancement of the science of jurisprudence and the effective administration of justice.'").

*4 See, e.g., Bar Organization Act*, 4 J. Am. Judicature Soc. 111-14 (1920); *Model Bar Organization Act*, 10 J. Am. Judicature Soc. 110-12 (1926).

Furthermore, "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977); *see also West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 633-34 (1943). An individual has the right not to be made "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715.[5]

The current challenge involves the State Bar of California and its expenditure of membership dues in a manner inconsistent with its dissenting members' beliefs. The mandatory bar dues in this case were used by the "State Bar of California to finance lobbying, amicus curiae briefs and other activities, including election campaign activities . . . ." *Keller* v. *State Bar of California*, 255 Cal. Rptr. 542, 543, 767 P.2d 1020, 1021, (Cal.) *cert. granted*, 110 S. Ct. 46 (1989).

The California Supreme Court held that the State Bar of California resembles a governmental agency and thus "the bar may use dues to finance all activities germane to its statutory purpose, a phrase [the court construed] broadly to permit the bar to comment generally upon proposed legislation or pending litigation." *Keller*, 255 Cal. Rptr. at 544, 767 P.2d at 1022. The only activity which the California Supreme Court prohibited was the bar's involvement in election campaigns. *Id.*

The entire analysis of the California Supreme Court in the instant case is premised on its conclusion that the State Bar of California is a governmental agency. That conclusion, however, fails to give any significance to the unique structure of a bar association which has aspects resembling both a governmental agency and a private association. This was noted in a cogent dissent.

5 In *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), the Third Circuit sustained the Beef Promotion and Research Act of 1985 against a First Amendment challenge. The Act required cattle producers to help finance, through compelled assessments, the beef industry's advertising. The court held that the First Amendment speech and association rights of cattle producers were not abridged. Regardless of the merit of the reasoning of the Third Circuit in that case, it has no bearing on this case. The messages being disseminated here are unrelated to the governmental interest justifying bar membership.



> [The majority's] error is grounded in [its] failure to recognize the significance of a crucial fact: The California State Bar derives its funds from membership dues which all attorneys, and only attorneys, in California are required by law to pay as a condition precedent to pursuing their livelihood — the practice of law — in the state. It is this fact — compelled membership in a professional association with mandatory dues as a condition to practice the profession of law — that subjects the State Bar to the constitutional scrutiny from which most other governmental agencies may be exempt.

*Id.* at 556, 767 P.2d at 1034 (Kaufman, J., concurring in part and dissenting in part).

The California Supreme Court's reasoning fails close analysis because while it may be true that a bar association is analogous to a governmental agency for some purposes, *i.e.*, attorney registration, discipline, and client security, there are many other activities which the bar association has undertaken that are more analogous to a labor union. The Committee does not question the authority of a mandatory bar to expend bar dues to further its governmental functions. However, activities such as lobbying and certain other activities do not further compelling state interests. In addition, the mandatory bars influence legislatures and courts to adopt particular points of view that may or may not further the special interests of the Bar and its membership.

Indeed, the composition, organization and operation of a mandatory bar association is much akin to a labor union. Thus, in evaluating the constitutionality of its activities the Court should look to *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, *reh'g denied*, 433 U.S. 915 (1977) and its progeny. As discussed below, the principles announced in *Abood* require a reversal of this case. Consistent with *Abood*, a mandatory bar should be limited to only activities that

further compelling state interests and those activities must be narrowly tailored to avoid any unnecessary infringement on First Amendment rights.

B. A Mandatory Bar's Lobbying Activities and Compelled Financial Support of Such Activities Violate The First Amendment Rights of Its Members Who Oppose Such Activities

In *Lathrop* v. *Donohue*, 367 U.S. 820, *reh'g denied*, 368 U.S. 871 (1961), this Court held that a state may require an attorney to become a member and pay reasonable annual dues to a mandatory bar in order to practice law within the state. This was the first case in which this Court dealt with the constitutional challenge to a mandatory bar. *Lathrop* was heralded by some as putting an end to the challenges against the mandatory bar. It has been recognized, however, that *Lathrop* did not decide the scope of permissible mandatory bar activities and whether an attorney can be forced to provide financial support for mandatory bar activities with which he disagrees. *Id.* at 847-48.

Writing for a plurality, Justice Brennan concluded that Lathrop's argument was essentially one of freedom of association.[6] "[A]ppellant's argument is that he cannot constitutionally be compelled to join and give support to an organization which has among its functions the expression of opinion on legislative matters and which utilizes its property, funds and employees for the purposes of influencing legislation and public opinion toward legislation." *Id.* at 827. The plurality responded that Lathrop was not being forced to associate with anyone and the only compulsion to which he was subjected was the payment of the fifteen dollars in annual dues. Thus, *Lathrop* discussed but did not decide the scope of permissible mandatory bar activity and whether a mandatory bar could compel dues for activities with which some of its members disagreed.

6 Also implicated in this issue is the right to pursue one's livelihood. This Court has recognized that the right to practice law is a fundamental right. *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 281 (1985).



In *Lathrop* this Court relied on *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225, *reh'g denied*, 352 U.S. 859 (1956), wherein it held that the Railway Labor Act "did not on its face abridge protected rights of association in authorizing union-shop agreements between interstate railroads and unions of their employees conditioning the employees' continued employment on payment of union dues, initiation fees and assessments." *Lathrop*, 367 U.S. at 842. In *Railway Employes'* the Court stated that "[o]n the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." 351 U.S. at 238. Justice Douglas, author of *Railway Employes'*, however, later retracted this statement. *Lathrop*, 367 U.S. at 879 (Douglas, J., dissenting).[7]

Accordingly, this Court has historically linked the fate of the mandatory bar to its decisions in the labor union context.[8] A number of post-*Lathrop* decisions of this Court which have addressed such a challenge in the labor context provide additional guidance to the issue in the context of a mandatory bar. For example, in *Abood*, 431 U.S. at 234, this Court held that a union cannot use "required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." Moreover, in *Abood* the union had to limit its use of compelled fees to causes that were germane to its duties as collective

7 In light of subsequent decisions, the dissents of Justices Black and Douglas have correctly foreshadowed the development of the law on compulsory membership. *See, e.g., Abood.*

8 Several federal and state cases have continued to apply this Court's decisions in the labor union context when resolving the issues that are now before the Court. *See, e.g., Hollar* v. *Government of Virgin Islands*, 857 F.2d 163 (3d Cir. 1988); *Levine* v. *Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989); *Gibson* v. *Florida Bar*, 798 F.2d 1564 (11th Cir. 1986); *Romany* v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir. 1984); *Arrow* v. *Dow*, 544 F. Supp. 458 (D.N.M. 1982); *In re Petition of Chapman*, 128 N.H. 24, 509 A.2d 753 (1986).

bargaining representative. *Abood* reaffirmed the established principle that the government cannot compel a person to belong to an organization for the purpose of spreading a political message.[9]

The result in *Abood* compels a conclusion by this Court that a mandatory bar may not engage in activities for purposes unrelated to the compelling state interests warranting mandatory membership; for example, for the purpose of spreading a political message. Moreover, the mandatory bar certainly cannot assess dues to be used to finance such impermissible activities. In the years since *Abood*, several state and federal courts have reached this conclusion.[10]

Indeed, the argument for restricting the permissible activities and use of compelled assessments in the context of a mandatory bar is even greater than in the context of a labor union. The labor union context involves compelled financial support of a union's activity which furthers the principles of exclusive union representation and the efficient contract negotiation which underlie the federal labor laws. The federal labor policies which are furthered by union shop and agency shop agreements are compelling state interests which this Court has determined justify any resulting encroachment on the First Amendment rights of dissenters. *Abood*, 431 U.S. at 220.[11] In contrast, in the context of the mandatory bar there is no strong policy which is furthered by having the bar "speak with one voice." Also, in the labor union context, compulsory financial support is necessary to protect the collective bargaining rights of all employees. There is no analogue in the mandatory bar context. Finally, because bar membership is mandatory, the Bar's position will always be attributed to its membership. Such is not always the case in the labor union context. Thus, there is less justification for the infringement on the First Amendment rights of attorneys than there is on dissenters in the labor union context.

9 This principle is derived, in part, from this Court's decision in *Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977), which dealt with the "First Amendment right to avoid becoming the courier for [the message of the state]."

10 *See generally Gibson*, 798 F.2d at 1569; *Falk* v. *State Bar of Michigan*, 418 Mich. 270, 342 N.W. 2d 504 (1983).

11 The issue in *Abood* involved an "agency shop" arrangement which required every employee represented by a union, even though not a union member, to pay a service charge equal in amount to the union dues. *Abood*, 431 U.S. at 211.



As previously noted, because the First Amendment rights of freedom of speech and association are fundamental rights any governmental intrusion upon these rights can be justified only by a compelling state interest. *Elrod* v. *Burns*, 427 U.S. 347 (1976); *see generally* L. Tribe, *American Constitutional Law* 977-86 (2d ed. 1988). It is clear since *Lathrop* that there are compelling state interests which justify compelled membership in a mandatory bar. Thus, this case is not a case concerning compelled membership *per se*.[12]

The compelling state interests underlying mandatory bar membership include the regulation and discipline of attorneys and the protection of the clients whom they serve.[13] There are, however, no compelling state interests which justify a mandatory bar's undertaking legislative lobbying and other purely political activities or the use of mandatory bar dues for such activities over objection by dissenting bar members. The bar's interest in these activities cannot justify the intrusion upon its members' First Amendment rights. While there may be a legitimate state interest in receiving comment from attorneys on issues germane to the role of attorneys in society, this state interest is not compelling when there are several voluntary bar associations which fulfill this need. In fact, voluntary bar associations are often in a better position to serve this need because they possess specialized knowledge in particular fields of law.[14]

Thus, not only are voluntary bar associations arguably more capable of informing legislators and courts on specific issues, but they are also the least restrictive alternative available. The practice of

12 One scholar has suggested that the concept of a mandatory bar may still be unconstitutional in its entirety even after *Lathrop*. *See* T. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case* (American Bar Foundation 1983). Noting that this Court did not decide whether mandatory bar dues could be spent over a dissenting member's objection, Schneyer argues — in light of this challenge and the existing associational infringements — this Court, when considering both challenges, may still conclude that the mandatory bar is unconstitutional. *Id.* at 67.

13 However, as discussed below, compelled membership in a bar may not be the least restrictive means of furthering these compelling state interests.

14 Even in a mandatory bar, Sections supported by voluntary dues can serve this need, as has been demonstrated by the District of Columbia experience. *See infra* note 29 and accompanying text.

law since *Lathrop* was decided has evolved into very specialized activity. Lawyers in today's society often find it necessary to confine their practices to specialized fields in order to serve their clients.[15] With this reality in mind it should also be recognized that a mandatory bar will not be able to take a position that reflects the views of all of its members, many of whom may be specializing in practices that are at odds with one another.

As this Court has often noted, even if "the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). In this regard, the significance of the voluntary bar associations simply cannot be overstated.

A mandatory bar is simply a convenient way to administer the state's compelling interest in regulating attorneys. Another less restrictive alternative to further a state's compelling interests in regulating attorneys would be for the state to establish an independent governmental agency with exclusive jurisdiction over attorneys licensed by the state. By taking this authority away from a mandatory bar and making membership voluntary the bar would be free to engage in any activity that it desires. Further, the state agency would be immune from constitutional challenges if it limited its activities to those furthering its compelling interests in regulating attorneys.

The California Supreme Court rejected the Court of Appeals decision which would have required the State Bar of California to determine whether contemplated activity was germane to the purposes justifying mandatory membership and whether the state interest in the activity was sufficient to justify the additional infringement on a dissenter's First Amendment rights.[16] The California Supreme Court's decision regarded this requirement as an "extraordinary burden" which the "bar has neither the time nor money to undertake . . . ." *Keller*, 255 Cal. Rptr. at 550, 767 P.2d

*15* This specialization is partially attributable to the vast body of specialized state and federal codes and regulations.

*16* *Keller* v. *State Bar of California*, 181 Cal. App. 3d 471, 226 Cal. Rptr. 448 (1986), *rev'd*, 255 Cal. Rptr. 542, 767 P.2d 1020 (Cal.), *cert. granted*, 110 S. Ct. 46 (1989).



at 1028. Curiously, the California Supreme Court seemed to balance fundamental First Amendment rights against the burden the state would suffer in preventing a violation of such fundamental rights.

Indeed, this Court has held in several cases that the avoidance of an administrative burden is not a compelling reason justifying infringement on First Amendment rights. *See, e.g., Tashjian* v. *Republican Party*, 479 U.S. 208, 217-18 (1986) (possibility of increases in the cost of administering the election system is not a sufficient basis for infringing First Amendment rights); *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972) ("[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, . . . that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.") (footnote ommited); *Schneider* v. *State*, 308 U.S. 147, 162-63 (1939).

Thus, in rejecting the analysis of the Court of Appeals the California Supreme Court has disregarded this Court's great body of constitutional jurisprudence which requires a compelling state interest, as opposed to administrative convenience, to justify a state's infringement on First Amendment rights.

The anomaly inherent in this issue is that many mandatory bars, in furtherance of educating the public about the principles embodied in the Constitution often do so at the expense of the First Amendment rights of their own members. The State Bar of California, in promoting its legislative and lobbying agenda, has acted with indifference to its 115,000 members. *Keller*, 255 Cal. Rptr. at 564 n.8, 767 P.2d at 1042 n.8 (Kaufman, J., concurring in part and dissenting in part).

Finally, while the Committee does not suggest that constitutional issues should be decided by acclamation, it may be useful for purposes of understanding the significance of this issue to review the results of a poll of the membership of the State Bar of California conducted by the State of California.[17] This poll

*17* Cal. Auditor Gen. Rep. P-605, *Results of the Plebiscite of Members of the State Bar of California* (1986). The results of the California Poll boasted a 44% response rate from more than 100,000 attorneys polled. Over 60% of the respondents favored a limitation of the legislative activities that were funded with mandatory bar dues. *Id.* An independent poll of Nebraska lawyers resulted in a pattern of responses that closely resembled the results of the California survey.

revealed that a very significant portion of the State Bar of California membership objects to the use to which their dues are put.[18] This highlights the fact that this issue is not an academic exercise but rather is an issue that concerns a large number of lawyers.

### C. The Experience of The District of Columbia Bar

Since 1972, lawyers practicing in the District of Columbia have been required to join the District of Columbia Bar.[19] The District of Columbia Bar [hereinafter Bar] has been active in a wide variety of programs. In the Bar's early years, the Board of Governors [hereinafter Board] filed *amicus curiae* briefs[20] and made recommendations on legislation,[21] in both instances purporting to act on behalf of the Bar membership. For example, the Board opposed a business privilege gross receipts tax and advocated a nonresident income tax. The Board also took positions on proposed legislation, *inter alia*, concerning consumer protection and police complaint machinery.

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*18* The California Supreme Court noted that all of the activities of which petitioners have complained were financed primarily from membership dues. *Keller*, 255 Cal. Rptr. at 544, 767 P.2d at 1022.

*19* Rules of the District of Columbia Court of Appeals Governing the Bar of the District of Columbia, Rule II, Section 1.

*20* In two instances, the Board filed motions for leave to file *amicus curiae* briefs with the District of Columbia Court of Appeals. *See Angarano* v. *United States*, 329 A.2d 453, 455 (D.C. 1974) (en banc); *United States* v. *Cummings*, 301 A.2d 229, 233 (D.C. 1973). In these cases the court accepted the briefs with some reservations but alluded to the serious constitutional issues presented by the Board's filing such briefs. In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, *reh'g denied*, 423 U.S. 886 (1975), the District of Columbia Bar sought to file an *amicus* brief with this Court urging that lawyers are subject to the antitrust laws. Leave to file was denied. *See Goldfarb* v. *Virginia State Bar*, 419 U.S. 1103, *reconsideration denied*, 420 U.S. 944 (1975).

*21* Pursuant to the Bar's Rules, the seven-member Executive Committee could determine the position of the Bar on legislation when the Executive Committee deemed expedited consideration necessary.



The Board, however, did not restrict its expression of positions on public issues to *amicus* briefs and proposals for legislation. For example, two days after the event, the Board adopted a resolution condemning President Gerald Ford's pardon of former President Richard Nixon and the Executive Committee also issued a statement criticizing the dismissal of Archibald Cox during the Watergate events.

Some members of the Bar were concerned about the wide range of actions the Board was taking. These members were not so much concerned with the particular positions advocated by the Bar, rather, they were opposed to the Bar taking a position on matters unrelated to its authority over the membership. Indeed, several Bar members who objected to the Bar's activities noted that the need for oversight of the Bar is especially great as to matters relating to the administration of justice because such matters may have a more immediate impact on lawyers.[22] These concerned members noted that compulsory membership in a bar association is an exception to the principle that people ordinarily have the right to resign from an organization, *i.e.*, "to vote with their feet." Therefore, it was maintained that there must be a compelling state interest to justify activities of a mandatory bar and that no such interest warranted the Board's filing of *amicus* briefs and making recommendations on legislation. In a 1976 referendum, brought about by a petition of the Bar membership, the members voted to restrict the Board's authority. After this referendum, the Board was limited to making recommendations on proposed legislation and filing *amicus* briefs

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*22* This fact was noted by Justice Grimes of the New Hampshire Supreme Court when he stated:

> Many lawyers find this compulsory membership offensive and the effect upon their personal liberty is not diminished because the causes are 'confined to issues related to the particular interests and competence of lawyers.' These issues can and do engender as deep feelings as any others.

*In re Unified New Hampshire Bar*, 112 N.H. 204, 207-08, 291 A.2d 600, 602 (1972) (Grimes, J., dissenting).

only on "matters closely and directly related to the administration of justice."[23] In addition, such recommendations could be made only after a referendum or meeting of the Bar membership on specific issues.[24]

At a general membership meeting of the mandatory Bar in 1979, a motion was adopted recommending that the Board urge ratification of the proposed District of Columbia voting rights amendment to the United States Constitution. Some members questioned whether this recommendation was authorized by the 1976 referendum. The Board decided that the proposal *was* "closely and directly related to the administration of justice."[25]

Thus, even after the 1976 referendum limiting the Board's authority to take positions on legislation and the filing of *amicus* briefs, the Board can take action on these issues if the action is approved by a vote of the Bar membership.

Nevertheless, as a result of the 1976 referendum, the threat to the Bar members' First Amendment rights in the District of Columbia is less than in California. The Committee, however considers the District of Columbia experience relevant to the issue now before the Court. In addition, there are three scenarios in which the decision of this Court may still have a significant impact on members of the District of Columbia Bar.

*First*, although the 1976 referendum limits many activities which may be undertaken by the mandatory Bar, the Board may still take positions on behalf of the Bar if the positions do not involve legislation or *amicus* briefs. For example, the Board could seemingly issue a press release stating the Bar's position on a particular issue or event.

*Second*, the 1976 referendum does not prevent the Board from taking positions on legislation and filing *amicus* briefs if authorized

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23 *Bar Business Referendum Results*, District Lawyer 45 (Fall 1976).

24 *Id.* The Bar membership rejected a proposal that would have completely prohibited the Board of Governors from filing *amicus* briefs or taking positions on legislation.

25 Also, in 1979, the Board of Governors submitted a referendum proposal to restore part of its lost authority to make recommendations on legislation. The members of the Bar rejected the Board's proposal.



by a vote of the membership on a specific issue by referendum or at a meeting.[26] Thus, the constitutional issue is still presented — the inability to disassociate oneself from the positions with which one disagrees — even when a vote of the membership favors taking a position.

*Third*, in the event the 1976 referendum were repealed or modified by the Bar membership, a favorable decision from this Court would protect members' rights as a matter of constitutional law.

In proposing the 1976 referendum many Bar members advocated authorizing the Bar's Divisions, now called and hereinafter referred to as Sections, to file *amicus* briefs and make recommendations on legislation.[27] This option was favored by many because the Sections are voluntary, have special familiarity and expertise in particular subject matters, and the free exchange of ideas would be promoted because Sections could take differing positions. Indeed, the Sections have been granted this authority.[28] For many years the Sections have been supported by voluntary membership fees and under this arrangement the Sections have been thriving.[29] They are acting with great autonomy and vigor providing service to the public and to the Bar, as well as providing professional

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26 As noted, among the members of the Committee there are those who have had long and close contact with the Board. Often there has been expression of relief by members of the Board at not having to be burdened by lengthy agendas reviewing numerous legislative proposals.

27 The Bar has 21 Sections open to both members and nonmembers involved in various activities which advance their specialized interests.

28 The Sections must make clear that they are not presenting the views of the Bar when they take positions on various issues and they cannot take positions on political issues. Nevertheless, some members oppose Sections taking positions because the views of a Section might be taken to be those of the Bar despite any disclaimer.

29 In a recent letter sent to the Bar membership urging participation in the Bar's Sections it was noted that "[t]he Sections are the largest and most active segment of the Bar.... Individual Sections have also submitted comments and provided forum for debate on timely issues within their expertise...." Letter from Robert N. Weiner to D.C. Bar Members (Oct. 13, 1989).

satisfaction to their membership.[30]

Events similar to those involving the District of Columbia Bar have been taking place throughout the country in many states with mandatory bars. For example, in response to an independent poll of Nebraska lawyers on this issue, the Nebraska State Bar Association [hereinafter NSBA] appointed a committee to study the NSBA's use of mandatory bar dues.[31] The committee, which is referred to as the Sennett Committee, concluded that "it is fair to say that in light of the authorities listed above, the Nebraska State Bar Association would have a very difficult time defending its current lobbying practices." *Sennett Committee Report* at 5 (the authorities referred to were precedents established by this Court).

These events in the District of Columbia and Nebraska, among others, underscore the significant impact that this Court's decision will have on members of mandatory bars throughout the nation.

## II. THE APPROPRIATE REMEDY IS AN INJUNCTION PROHIBITING A MANDATORY BAR FROM ENGAGING IN ACTIVITIES THAT FAIL CONSTITUTIONAL SCRUTINY

The State Bar of California should be enjoined from undertaking activities that fail to further compelling state interests and that are not narrowly tailored to reduce the infringement on the First Amendment rights of its membership. Moreover, the State Bar of California should be restricted from using mandatory dues to support political and ideological activities unrelated to its role as the primary regulator of California attorneys.

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*30* We note in the interest of completeness that members of the District of Columbia Bar, by referendum in 1980, limited the use that can be made of mandatory dues to admission, registration, discipline and a client security fund. The District of Columbia Court of Appeals permitted the referendum to take effect with some modification. *On Petition to Amend Rule I of the Rules Governing the Bar*, 431 A.2d 521 (D.C. 1981). A 1988 referendum to repeal or modify the 1980 referendum was defeated. The 1980 referendum does not limit Bar activities which are self-sustaining or supported by voluntary fees or contributions.

*31* Nebraska State Bar Association, *Report of Special Committee on NSBA Policy on Legislation* (1987) [hereinafter *Sennett Committee Report*].



In the labor union context, this Court has approved several variations of a dues checkoff to remedy a labor union's use of compelled dues for improper purposes.[32] This remedy is simply inadequate in the context of a mandatory bar because — as already noted — positions taken by a mandatory bar will still be attributed to its entire membership regardless of whether a dissenter has chosen not to support a particular position. Furthermore, the opinion of a majority or even all of a mandatory bar's Board of Governors cannot rationally be said to be the opinion of the majority of the members who are compelled to belong. Thus, as long as a mandatory bar uses the power of the state to compel membership it must also abide by the constitutional limitations on this coercive power.

Accordingly, the First Amendment is violated even by the taking of a position by a mandatory bar without actually appropriating money to advocate the position. The mandatory bar misses the point of its dissenting members' objections when it proposes dues checkoff procedures in tandem with a policy allowing continued legislative and lobbying activities. It is generally not only the fact that a small portion of the regular dues assessment will be used for lobbying that offends dissenters; it is this plus the fact that the bar's official positions will be imputed to the dissenters.[33]

This analysis illustrates that the remedy often employed in the labor union context fails to cure the underlying constitutional violations in the context of a mandatory bar.[34] Although voluntary *Abood*-type remedies have been implemented by many mandatory bars,[35] these remedies are clearly inadequate. It is for this reason

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*32 See, e.g.*, *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986); *Ellis* v. *Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984).

*33 See generally* Schneyer, *supra* note 12 at 63-64.

*34* In *Abood*, as well as the other decisions in the labor union context, this Court did not have the option of prohibiting the objectionable activity because to do so would have infringed upon the First Amendment rights of the union members who voluntarily have associated themselves with the union.

*35* For example, Michigan has adopted an *Abood*-type procedure. Admin. Order No. 1985-1, 420 Mich. *lviii* (1984). In addition, the NSBA has adopted its Sennett Committee's recommendations. For a thorough discussion of the inadequacies of the remedy proposed by the Sennett Committee Report, see *Special Project*, *supra* note 3, at 803-05.

that if this Court reverses the California Supreme Court and holds that a mandatory bar cannot use compelled dues for lobbying activities the Court should also address the proper remedy.

When a constitutional violation is involved, allowing the activity to continue is simply not an option. An injunction must issue to enjoin the unconstitutional activity. A checkoff arrangement is inadequate because it allows the mandatory bar to continue the activity which has been found unconstitutional. Furthermore, returning an objecting bar member's *pro rata* share of dues found to be used for impermissible activities does not redress the constitutional violation.

In other contexts it would never be suggested that the government may continue unconstitutional activities if it simply "buys out" those that object to the activity. Such a result should not be reached in this case. Since the impermissible use of compelled dues is neither justified nor cured under a checkoff system, such procedures are nothing more than a perpetual system of violations and possible repayments. Thus, the fundamental constitutional infirmity is never removed.

This Court should hold that a mandatory bar's lobbying activities and the compelled financial support of such activities violate the First Amendment. There are no compelling state interests which justify these activities.[36] Although legitimate state interests are implicated, these state interests are met through the widespread involvement of voluntary bar associations. Moreover, there are less restrictive alternatives available to the state to further its compelling interests. Accordingly, this Court should hold that the State Bar of California may not engage in legislative lobbying activities.

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*36* Alternatively, given the range of practical solutions, this Court should hold that the California Supreme Court failed to adequately consider alternatives which are less restrictive on First Amendment rights. Accordingly, this Court should vacate the judgment of the California Supreme Court and remand this case so that it can consider the practical alternatives to the mandatory bar's legislative lobbying and compelled financial support of such lobbying. As noted, voluntary Bar Sections in the Disrtict of Columbia have proven to be a workable solution to this problem.



## CONCLUSION

For the foregoing reasons this Court should reverse the judgment of the California Supreme Court.

Respectfully submitted,

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